Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Richard Corbeil; Canada Council of Teamsters,

complainants,

and

Challenger Motor Freight Inc.,

respondent.

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September 2, 2011

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members. A hearing was held in Montréal on May 17, 2011.

Appearances

Mr. Stéphane Lacoste, for Mr. Richard Corbeil and the Canada Council of Teamsters;
Mr. Luc Deshaies, for Challenger Motor Freight Inc.

These reasons for decision were written by Ms. Louise Fecteau, Vice-Chairperson.

I–Nature of the Complaint

[1] This is a complaint of unfair labour practice filed on June 10, 2010, by the Canada Council of Teamsters (the union or the Teamsters) pursuant to section 97(1) of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*). The union alleges that Challenger Motor Freight Inc. (Challenger or the employer) violated section 94(3)(*a*)(i) of the *Code* in that it took retaliatory and discriminatory action against Messrs. Richard Corbeil and Serge Lapointe, among others, because of their union activity when, on May 17, 2010, it withdrew their right to take the company's tractor trailers (hereinafter "the vehicle") home. The union submits that, up until May 2010, Mr. Corbeil and other employees had been allowed to take the vehicles they were driving to their respective homes.

[2] The union asks the Board to allow the complaint and to restore the employer's prior practice.

[3] The employer called two witnesses, Mr. Eugene Moser, President of Challenger, and Mr. Laurier Bourgon, Regional Director at Challenger in Dorval, Quebec. The union called the following witnesses: Mr. Claude Bellemare, Ms. Sylvie Leclair and Mr. Richard Corbeil, all of whom work for Challenger as long-haul drivers.

[4] The Board will not provide a full account of the testimony, but will outline the evidence considered relevant and necessary for the purposes of this decision.

II–Background and Facts

[5] Challenger is a motor freight company that operates throughout North America. The area it services is divided into three major regions: Western, Central and Eastern Canada. In the fall of 2009, the Teamsters launched an organizing campaign aimed at Challenger employees. The union claims that it was because of Mr. Corbeil's union activity that long-haul drivers lost their right to take the vehicles they drive home. According to the union, this is a form of retaliation that is contrary to the provisions of the *Code*.

[6] Although the employer does not deny that Mr. Corbeil was actively involved in the Teamsters' organizing campaign or that there was an attempt to unionize Challenger employees in the fall of 2009, it does deny that its long-haul drivers had the right to take the vehicles with which they worked to their respective homes. The employer points out that the company has policies in that regard, known as Truck Home Policies.

III–The Evidence

A–The Employer

[7] Mr. Eugene Moser, President of Challenger, describes the operations of the company, which services all of North America from a number of terminals across Canada, including the one in Dorval, Quebec. Challenger employs 1315 drivers, including some 200 working out of the Montréal terminal, and owns a fleet of 1250 tractors and 3300 trailers, which Mr. Moser estimates are worth about $125,000 each and $25,000 each, respectively.

[8] Mr. Moser describes a long-haul driver's work week. The driver is away from the terminal out of which he or she works between five and six days a week. In other words, the driver is on the road throughout this time. Drivers are constantly assigned runs (to a destination and from a loading point).

[9] Mr. Moser explains the Truck Home Policies. The policy document, dated March 28, 2007, which is entered into evidence, reads in part as follows:

> SUBJECT: Truck Home Policies
>
> This memo stipulates the conditions under which a Company Driver is allowed to take a unit to their residence **under load or at the end of their work cycle.** It also clarifies what miles are paid or not paid for both Company Drivers and Owner Operators.
>
> Our company policy is that tractors are to be parked at the driver's home terminal or the closest company facility **if the driver lives in an area away from their home terminal.** There are no guarantees stipulated by Recruiting to drivers that they may or are allowed to take trucks to their residence during or upon completion of their work period. Drivers who live within a 40 km (25 miles) radius of their home terminal should not take a company unit home. Exceptions may be granted by Safety or Operations Supervisors when there are justifiable reasons for doing so.
>
> Drivers who take their tractors home are subject to the following:

...

6) Drivers will not be compensated for the miles home, miles returning to a CMF facility or to their point of load when bob tailing or being hooked to an empty trailer. Their next paid miles will be from the loading point to destination. For exemple; if a driver is sent from Cambridge to Kingston with their unit bob-tail or with an empty trailer and their next load is in Belleville, they receive no compensation for miles home and then to Belleville. The paid miles would not start until they are loaded in Belleville. If a Montreal based driver is being sent to Dorval terminal from Cambridge with an empty to get home, then those miles would be paid to the Dorval terminal.

....

Please take note that the above measures are not being done to create hardship on anyone, we are simply trying to control costs and have knowledge of where our tractors are. **Most of these requirements have been in place prior, however for one reason or another they have not been monitored or followed consistently.**

[sic]

(emphasis added)

[10] Mr. Moser submits that the policies apply to all Challenger drivers across Canada and are implemented for a number of reasons, including ensuring the security of the tractors and trailers and controlling operating costs. He adds that none of the company's competitors allow drivers to take their vehicles home. Mr. Moser maintains that fuel costs have increased substantially between January 2003 and March 2011. He refers to a policy introduced in 2006, also entered into evidence, that set a maximum speed limit for drivers as a result of rising fuel prices. The policy reads in part as follows:

All units will be set at a maximum speed of 100 KPH (62mph) on both the pedal and cruise control. We will allow the trucks to gain more speed to 104 KPH (65mph) if the fuel mileage on the unit is greater than 7.0 miles per gallon and the idle time is below 30%.

[11] Mr. Moser submits that he had been informed in May 2010 that some drivers were failing to respect the policies and were taking Challenger vehicles home at the end of their assigned runs. He admits that there had been some laxity in the enforcement of the policies and also that the policies were not all that clear. Following complaints allegedly received by management from some drivers, an investigation had been conducted regarding drivers who were taking their vehicles home. The evidence shows that, of 51 drivers, 22 had not been abiding by the policies. According to Mr. Moser, the list of drivers was produced by Operations staff in the three regions. Mr. Moser states that those responsible in each of the three regions had met with the drivers individually and informed them that

they were henceforth required to comply with the policies. Mr. Moser indicates that failure by drivers to abide by the policies had led to higher operating costs for each vehicle. For example, a table entered into evidence shows that the operating costs of a vehicle (tractor trailer) such as the one driven by Mr. Richard Corbeil is $1.07 per mile. During the period between January and June 2010, Mr. Corbeil had logged 1566 miles of use on his vehicle, whereas the average number logged was 1021 miles per truck. The discrepancy is due to his failure to comply with the Truck Home Policies.

[12] Mr. Laurier Bourgon has also testified for the employer. He works in Montréal as Regional Director for the Eastern region. Mr. Bourgon comments on the table that identified about 20 drivers who were not complying with the employer's Truck Home Policies. According to Mr. Bourgon, a number of those under his supervision had been allowed to take their vehicles home in the past as doing so had been warranted by their assigned runs, but this was no longer the case. Mr. Bourgon states that Challenger has lost a number of clients in the last year and the slower economy has also led to reductions in the number of runs for certain other clients. In other cases, the runs assigned to drivers do not warrant the drivers taking company vehicles home, given the high costs. Using the case of Mr. Richard Corbeil, driver number 36, as an example, he points out that the driver lives in Saint-Lin-Laurentides, Quebec, and that the only client in that area is JC Perreault, in Saint-Roch-de-l'Achigan, 15 miles from Saint-Lin-Laurentides. Mr. Bourgon indicates that there are few shipments to or from JC Perreault, estimating the number of deliveries made to that client at three or four a month. He also indicates that Mr. Corbeil generally starts his work week on Mondays and makes runs to the United States, returning to Quebec on Thursdays or Fridays. Under the policies described above, Mr. Corbeil is not allowed to take his vehicle back to Saint-Lin-Laurentides on returning from the United States.

[13] According to Mr. Bourgon, the situation is the same for Ms. Sylvie Leclair, driver number 40, who lives in Drummondville, Quebec. In May 2010, Challenger had lost a contract for shipments to and from OSRAM SYLVANIA, a major client in the region where Ms. Leclair lives. Mr. Bourgon states that, since the loss of that contract, Ms. Leclair has been required to park the company vehicle in Dorval, in accordance with Challenger's policies, whereas the runs she had previously made for OSRAM SYLVANIA had made it possible for her to park the vehicle at home.

[14] During cross-examination, Mr. Bourgon states that drivers could still and would continue to be able to take their vehicles home where warranted by the routes driven; however, where such is not the case, they are required to abide by the policies implemented in 2007.

B–The Union

[15] The union's first witness is Mr. Claude Bellemare, who has worked as a driver for Challenger for 13 years. He has lived in Trois-Rivières for 25 years. According to Mr. Bellemare, he lost the right to take the company vehicle home in July 2010. He states that, before that time, he had always been allowed to take the vehicle home, right from the start of his employment with Challenger. Mr. Bellemare indicates that his wife now has to drive him to and from the terminal, a round trip of 162 kilometres. He is sometimes on the road for two to three weeks at a time. He says that he was unaware of the policies referred to by Messrs. Moser and Bourgon. In cross-examination, he states that no other drivers have any routes in the area in question.

[16] Witness Sylvie Leclair has also testified. She has been working as a driver for Challenger since 2004 and lives in Drummondville. She states that she had been taking the vehicle home with her since 2006 because she had been able to do delivery work in the area. She indicates that that was the reason she had taken the job with Challenger in the first place. She used to provide services to three major clients, OSRAM SYLVANIA, SPG Inc. and Kampex, all located within a few kilometres of her home, but now provides service to only two of them. Since May 2010, runs in the area have justified her taking the vehicle home. Mr. Bourgon had also advised her in May 2010 that she was to cease taking the vehicle home, citing economic reasons. She submits that this caused her financial problems. She, like Mr. Bellemare, maintains that she had never seen the policies referred to by Messrs. Moser and Bourgon. She indicates that she had been actively involved in the union organizing campaign aimed at the Montréal drivers. She had worn the Teamsters pin since November 27, 2009, in an effort to persuade her co-workers to join the union.

[17] The union's third witness is Mr. Richard Corbeil, who has worked as a driver for Challenger since 1994. He lives in Saint-Lin-Laurentides. He states that he did delivery work near his home to his clients, Paramount Pallet, Kruger and JC Perreault. He testifies that since starting the union

organizing campaign, he has not provided freight services to JC Perreault, where he had previously gone on Monday mornings.

[18] On May 17, 2010, Mr. Corbeil was advised that he could no longer take the company vehicle home after finishing his runs. He states that, up to that time, he had taken the vehicle home and that had been part of his conditions of employment. He indicates that Mr. Bourgon had told him that it was a new Challenger policy that applied to all terminals across Canada and that there was nothing personal about the decision. The witness states that he had never seen the policy document dated March 28, 2007, entered into evidence by the employer. He believes that about 20 drivers took company vehicles home. He submits that he had been actively involved in the union organizing campaign launched in November 2009. In fact, he had been the one to contact the Teamsters in August of that year. He, like Sylvie Leclair, wore the Teamsters pin in an effort to persuade his co-workers to join the union. He states that he was still campaigning to unionize the drivers.

IV–Rebuttal Evidence

[19] The employer reexamines witness Laurier Bourgon. Mr. Bourgon states that all drivers have received the employer's Truck Home Policies document dated March 28, 2007, which prohibits drivers from using their vehicles for personal use. It was allegedly placed in their respective compartments, where their pay is placed.

[20] With respect to Ms. Leclair's testimony, Mr. Bourgon indicates that, until the previous year, she had been allowed to take the vehicle home because of her client OSRAM SYLVANIA, for which she had made runs back and forth from Drummondville to Kentucky. There have been 24 runs to do per week. However, Challenger had lost that client the previous year. A similar situation had happened with two other major clients for which Ms. Leclair had provided freight services until early 2010: Challenger had lost one of the clients and the other client's cyclical demand for freight services no longer required sufficient runs to warrant her taking the vehicle home. The witness states that he had met with Ms. Leclair on July 9, 2010, rather than in May as she had indicated, and had informed her that the 2007 policies would have to be applied in view of the reduced number of runs resulting from the loss of clientele.

[21] According to Mr. Bourgon, the situation is the same for Mr. Corbeil. The demand for freight services by the clients serviced by Mr. Corbeil (Kruger, Paramount Pallet) is no longer sufficient to warrant his taking the vehicle home. For instance, it had been two years since his last run for Kruger. As for his client JC Perreault, the runs started in the United States, not the Laurentian region, and since only about one run every three weeks is needed, there is no justification for taking the vehicle home.

[22] As for Mr. Bellemare, Mr. Bourgon states that there is insufficient demand for freight services from his clients. For instance, Coca Cola's need for services is sporadic. The same is true of Kruger, which has been experiencing a decline in its operations in recent years. Mr. Bourgon maintains that Mr. Bellemare had been given permission to take the vehicle home once since the policies have been imposed across the board, and that had been because the runs warranted his doing so. With regard to Mr. Bellemare's testimony to the effect that a driver by the name of Neveu had been allowed to continue taking his vehicle home, Mr. Bourgon maintains that Mr. Neveu had been given permission to do so only once, because of mechanical problems with his personal vehicle.

V–Oral Arguments

[23] The employer does not contest the fact that there was union activity by the employees and it recognizes that the burden is on it to show that the introduction of the policies applicable to all drivers was in no way related to the union activity taking place since the fall of 2009. It refers back to the testimony of Mr. Moser, who indicated that he had been informed of the fact that the 2007 Truck Home Policies were not being followed by all drivers and that this was causing discontent among the drivers. The employer points out that Mr. Moser also recognized that there had been some negligence in enforcing the said policies. As a result, meetings had been held with those employees who were not abiding by the policies, as shown by the evidence, to warn them that laxity in this regard would no longer be tolerated, for economic reasons. The employer further submits that the evidence also shows that vehicle operation costs for drivers who ignore the policies are much higher than those for employees who abide by the policies. The employer states that, in fact, as may be seen in the evidence, only a very small minority of drivers were not abiding by the policies. It

admits that the policies may be disadvantageous for some drivers, but submits that none of its competitors tolerates drivers taking trucks home. The employer adds that the evidence shows that witnesses Bellemare, Leclair and Corbeil all lost runs (to destinations and from loading points) either because of loss of clientele or because some clients were experiencing slowdowns.

[24] The employer submits that imposing the 2007 Truck Home Policies was not because of anti-union animus. It asks that the Board dismiss the union's complaint.

[25] The union, for its part, submits that Mr. Corbeil quite overtly took part in the union organizing campaign launched in November 2009. In its view, the employer failed to discharge the burden of proof imposed on it on the basis of the presumption in section 98(4) of the *Code*.

[26] According to the union, allowing some drivers to take their vehicles home benefited both the employer and the employees. It submits that there was justification for allowing Ms. Leclair and Messrs. Bellemare and Corbeil to do so. It points out that, according to Mr. Corbeil's testimony, other employees still enjoyed such benefits. It further submits that all three witnesses in question testified that they had never seen the Truck Home Policies of 2007. Additionally, Mr. Moser indicated that the policies were not clear. The union adds that Ms. Leclair's testimony concerning the date of their meeting in July 2010 contradicts that of Mr. Bourgon. It submits that Mr. Moser was never involved in the investigation of May 2010 to identify the drivers not complying with the policies. It also indicates that Mr. Moser was not the one who produced the document showing which drivers were abiding by the policies and which were not.

[27] According to the union, the employer failed to discharge its burden of proof. It concludes by stating that it is not up to the Board to determine whether or not the policies are reasonable. The only matter to be determined by the Board is whether the union activity had anything to do with the employer imposing the Truck Home Policies of 2007. It asks that the Board allow the complaint.

VI–The Law

[28] Section 94(3)(*a*)(i) provides, *inter alia*, that no employer shall discriminate against any person with respect to employment, pay or any other term or condition of employment because of that person's involvement in union activity. In the matter before it, the Board must determine whether prohibiting long-haul drivers from using company vehicles to return home after completing their assigned runs was motivated by anti-union animus on the part of the employer.

[29] The relevant provisions of the *Code* read as follows:

> 94.(3) No employer or person acting on behalf of an employer shall
>
> (*a*) refuse to employ or to continue to employ or suspend, transfer, lay off **or otherwise discriminate against any person with respect to** employment, pay or **any other term or condition of employment** or intimidate, threaten or otherwise discipline any person, because the person
>
> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union.
>
> (emphasis added)

[30] Section 98(4) of the *Code* provides as follows:

> 98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

[31] In *Larose-Paquette Autobus Inc.* (1990), 83 di 175 (CLRB no. 840), the Board's predecessor, the Canada Labour Relations Board (CLRB), stated the following about the Board's duty in a complaint under section 94(3)(*a*)(i) of the *Code*:

> This warrants that the Board carefully examine all the evidence to determine whether in fact anti-union animus was present. In order to prove that its action was devoid of anti-union animus, the employer can argue that the penalty imposed on the employee was rational and warranted strictly from the standpoint of sound management.
>
> (page 177)

[32] However, as the CLRB noted in *Canada Post Corporation* (1983), 52 di 106; and 83 CLLC 16,047 (CLRB no. 426):

> ... Notwithstanding the burden of proof provisions of section 188(3) [now subsection 98(4)]of the *Code*, there has to be some substance to a complaint upon which a contravention of the *Code* can be founded.
>
> (pages 115; and 14,401)

[33] It is important to remember that each complaint must be assessed in light of its own facts and circumstances. In complaints alleging anti-union animus, the Board generally examines the employer's conduct in light of the circumstantial evidence, including any coincidence between the time of union activities and the decision or actions complained of.

VII–Analysis of Evidence

[34] Anti-union animus can take different forms. Evidence of its existence is often derived from hints of such or from circumstantial evidence.

[35] In light of the weight of the presumption established in section 98(4) of the *Code* and the Board's sense of the evidence as a whole, the Board is unable to find that the employer's conduct was tainted by anti-union animus.

[36] It is true that a certain amount of laxity appears to have been observed in the enforcement of the Truck Home Policies since their introduction in 2007, at least in relation to drivers whose assigned runs did not warrant their returning home with their vehicles. This appears to have been the case for Mr. Bellemare, whose runs did not appear to warrant taking the vehicle home even before May 2010. However, Mr. Bellemare was also servicing Kruger, and the evidence shows that the freight services required of that client have dropped drastically in recent years.

[37] With regard to Ms. Leclair and Mr. Corbeil, the evidence shows that Challenger either lost clients or experienced a substantial drop in demand for freight services in 2010, and this has meant that, in accordance with the policies, drivers are no longer permitted to take their vehicles home. This evidence was not contradicted. Mr. Bourgon did state that if in the future their runs warranted it, drivers would once again be allowed to take their vehicles home. Furthermore, of the 51 drivers who were investigated by the employer in 2010, and who were taking vehicles home, 29 were found to be abiding by the policies. This means that the employer has continued to allow drivers to take vehicles home if runs warrant it.

[38] Although the union activity was made very clear by some employees and although the employer was aware of such activity, the Board is unable to find that the employer imposing the policies around May 2010 was in any way connected with the organizing campaign initiated in November 2009. Further, the employer showed that, between January and June 2010, the fact that Mr. Corbeil used the company vehicle despite the lack of justification for such use resulted in substantially higher than average operating costs for that vehicle.

[39] With regard to the employees' testimonies that they had never seen the policies, the Board has no reason to doubt Mr. Bourgon's testimony that all drivers were given the policies. However, it does not doubt the drivers' testimonies either. It may very well be that the said policies, which date back to 2007, were simply ignored, first because of the employer's laxity in enforcing them and second, because the runs assigned to the three drivers in question likely warranted their taking their vehicles home.

[40] In light of the evidence, the Board is of the view that the employer imposing the Truck Home Policies was not motivated by anti-union animus. The employer has therefore discharged its burden of proof.

[41] For these reasons, the complaint of unfair labour practice filed under section 97(1) of the *Code* is dismissed.

[42] This is a unanimous decision of the Board.

Louise Fecteau
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member